been made or act done which cannot be changed without doing substantial injustice, the court may give effect to such order or act to the extent necessary to avoid any such injustice.

All rules theretofore prescribed by the Supreme Court, regulating the practice in suits in equity, shall be abrogated when these rules take effect.

THE NEW AND THE OLD FEDERAL EQUITY RULES COMPARED.

With the promulgation of the new Equity Rules by the Supreme Court of the United States on the 4th of November, 1912, and the adoption by Congress of the "Judicial Code," federal procedure has been greatly simplified. Among the many changes made by the "Code," the abolishing of the time-honored Circuit Court was perhaps the most radical. The innovations contained in the new rules practically revolutionize the equity practice in the federal courts.

The object of this paper is to point out these innovations, and to show wherein the old rules have been changed. The old rules are expressly abrogated, but many of them are utilized, either in whole or in part, in the new set.

TECHNICAL PLEADING ABROGATED.

Demurrers and pleas are abolished. Rule 29.

And moreover, all technical forms of pleading are abrogated. Rule 18.

Every defence in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion, or in the answer. Rule 29.

CONTINUANCES.

Continuances are frowned upon. Rule 57 provides that a cause shall not be continued beyond the term save in exceptional cases by order of the court upon good cause shown by affidavit and upon such terms as the court shall in its discretion, impose.

Continuances beyond the term must be by consent of both parties, and the payment of all costs then accrued. In the event of such a continuance the case is dropped from the trial calendar, but may be reinstated within a year upon application of either party; if not so reinstated, the suit shall be dismissed without prejudice.

MOTION DAY.

Each District Court is directed to appoint a "motion day"—not less than one in each month, when motions requiring notice and hearing may be made and disposed of. Rule 6.

TIME FOR FILING ANSWER.

Rule 12 provides that upon filing of the bill, the process of subpœna shall issue thereon, returnable twenty days thereafter. The answer or other defence must be filed on or before the twentieth day after the *service* of the process; otherwise the bill may be taken *pro confesso*. A mere appearance on the return day and the filing of the answer on the succeeding Rule day, as now obtains, no longer suffices.

AMENDMENTS.

Amendments are more liberally allowed than formerly, it being provided that the court may, at any time, in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading, or record to be amended; and the court, at every stage, *must* disregard any error or defect in the proceeding which does not effect the substantial rights of the parties. Rule 19.

SCANDAL AND IMPERTINENCE.

The right, now existing, to except to bills, answers and other proceedings because of scandal or impertinence, no longer exists; but the court may, on motion, or of its own initiative, order any redundant, impertinent or scandalous matter to be stricken out. Rule 22.

SIGNATURE OF COUNSEL.

The signature of counsel is required to every bill or other pleading, and is to be considered as a certificate that he has read the pleading; that, upon the instructions laid before him regarding the case, there is good ground for the same; *that no scandal-*

ous matter is inserted in the pleading; and that it is not interposed for delay. Rule 24. The provisions in italics are entirely new.

FRAME OF BILL.

The frame of the bill of complaint is given in Rule 25. It does not differ materially from the old rule. The main object sought seems to be brevity. If *special relief* is sought the bill must be verified by the oath of the plaintiff, or someone having knowledge of the facts. This seems to have been necessary heretofore only in the case of a bill brought by one or more stockholders in a corporation against the corporation, and Rule 27 continues this practice.

SEVERAL CAUSES OF ACTION.

The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. Rule 26. This seems to do away with the objection of multifariousness to a bill; at least, so far as the joinder of various causes of action against one defendant is concerned. The rule further provides that if there is more than one plaintiff the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. The court, however, may order separate trials if such causes of action cannot be conveniently disposed of together. And another rule (22) provides that if a suit is commenced in equity, whish should have been brought on the law side of the court, it shall be forthwith transferred to the law side, with only such alteration in the pleadings as shall be essential.

ANSWER.

It is provided that the answer shall set out the defence "in short and simple terms." Rule 30. Averments of the bill, if not denied, shall be deemed confessed, except as against an infant, lunatic or other person *non compos,* and not under guardianship, but the court may allow the answer to be amended, upon reasonable notice, so as to put any averment in issue, when justice requires it. The old rule provided that every defendant "may swear to his answer before certain officers. The new rules do

not require the answer to be sworn to. In fact, it seems that an oath to pleadings is required only in the cases above referred to under the caption "Frame of the bill" and to a petition for rehearing.

REPLICATION.

Unless the answer asserts a set-off or counterclaim, no reply thereto shall be required without special order of the court or judge, and the cause is then at issue—any new or affirmative matter contained in the answer being deemed to be denied by the plaintiff.

If the answer does include a set-off or counterclaim, the party against whom it is asserted shall reply within ten days after the filing of the answer, unless a longer time be allowed by the court or judge. If the counterclaim is one which affects the rights of other defendants, they or their solicitors shall be served with a copy of the same within ten days from the filing thereof, and ten days shall be accorded such defendants for filing a reply. In default of a reply, a decree *pro confesso* on the counterclaim may be entered. Rule 31.

EXCEPTIONS ABOLISHED.

Exceptions for insufficiency of an answer are abolished, but if an answer sets up an affirmative defence, set-off or counterclaim, the plaintiff may, upon five days notice, test the sufficiency of the same by motion to strike out. If found insufficient but amendable, the court may allow an amendment upon terms, or strike out the matter. Rule 33.

SUPPLEMENTAL PLEADING.

If material facts occur after either party has plead, or of which he was ignorant when the pleading was filed, Rule 34 provides for a supplemental pleading.

NUMEROUS PARTIES.

When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole. Rule 38. This materially broadens the old rule.

TESTIMONY ORE TENUS.

Possibly one of the greatest changes in procedure is effected by Rule 46, which provides that in all trials in equity the testimony of witnesses shall be taken *orally in open court,* except as otherwise provided by statute, or the Rules. When evidence is offered and excluded, the court must make such a statement respecting it as will clearly show the character of the evidence, the form in which it was offered, the objection made, the ruling, and the exception. And the appellate court must not reverse the action of the lower court even if it believes such evidence admissible, *unless* it be clearly of opinion that material prejudice will result from an affirmance.

As the necessary result of this rule, it follows (as set forth in Rule 47) that depositions are to be taken only in exceptional instances; and the rules provide practically the same routine for compelling the attendance of witnesses, etc., when a case is referred to either a commissioner, master or examiner as now obtains.

After a cause is at issue, depositions may be taken as now provided in Sections 863, 865, 866 and 867 of the Revised Statutes. These sections provide for depositions *de bene esse* and in *perpetuam rei memoriam.*

PATENTS AND TRADE-MARKS.

In cases involving the validity or scope of a patent or trademark, the court may, upon petition, order that the testimony in chief of expert witnesses, whose testimony is directed to matters of opinion, be set forth in affidavits, and time limits are fixed for each side. If either party desires to cross-examine such expert witness, the cross-examination must take place before the court at the trial.

REFERENCE TO MASTER.

Save in matter of accounts, a reference to a master "shall be the exception, not the rule." Rule 59.

Several rules provide for the method of proceeding when such a reference has actually been made. Rules 60, 61, 62, 63, 64, 65. They do not very materially differ from the old rules on the subject. The report of the master shall stand confirmed unless, within

twenty days (formerly one month) after it has been filed, either party has excepted to it. Standing masters, as now provided for, may be appointed, or a master may be appointed *pro hac vice* in any particular case.

INJUNCTIONS.

No *preliminary injunction* shall be granted without notice to the opposite party. Rule 73. Nor shall any *temporary restraining order* be granted without notice, *unless* it clearly appear from specific facts, shown by affidavits, or by the verified bill, that *immediate* or *irreparable* loss or damage will result to the applicant before the matter can be heard on notice. When such an order, without notice, is granted, it must be made returnable as soon as possible, and, in no event, later than ten days thereafter. It takes precedence of all matters, except older matters of the same character. When the matter comes up for hearing, the applicant shall proceed with his application for a preliminary injunction. If he does not do so, the temporary restraining order shall be dissolved The party against whom the temporary restraining order has been issued, may give two days notice to the other party and move the dissolution or modification of the order. Every temporary restraining order shall be forthwith filed in the Clerk's office. All of these provisions are entirely new.

APPEALS.

The general subject of appeals is not treated in the old equity rules, but the new rules provide a complete procedure therefor. It is provided, first, that the appellant, or his solicitor, shall file a *praecipe* with the Clerk indicating the portions of the record to be incorporated in the transcript. Should the other side desire additional portions of the record incorporated, he may file, within ten days thereafter, his *praecipe* therefor; second, the evidence is not to be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented being stated only in narrative form; third, if, however, either party so desires, and the court so directs, any part of the testimony may be reproduced in the exact words of the witness; fourth, the court settles all differences between the parties as to the transcript, and what it shall or shall not contain. Rule 75.

Rule 76 provides that "especial care shall be taken to avoid the inclusion of more than one copy of the same paper," and to exclude formal and immaterial exhibits, etc. Costs for infractions of this rule may be imposed not only upon parties, but upon offending solicitors! If, however, anything material be omitted "by accident or error," the appellate court, on a proper suggestion or of its own motion, may direct that the omission be corrected by a supplemental transcript.

SIMPLE METHOD OF APPEAL.

There is another provision as to appeals of striking simplicity. It is provided that when questions presented by an appeal can be determined by the appellate court without an examination of all the pleadings and evidence, the parties, with the approval of the District Court or Judge, may prepare and sign a statement of the case showing how the questions arose and were decided, and setting forth so much only of the facts alleged and proved, or sought to be proved, as is essential to a decision of such questions. This statement, filed in the Clerk's office of the District Court, supersedes all parts of the record other than the decree from which the appeal is taken, and, together with such decree, shall be copied and certified to the appellate court as the record on appeal. Rule 77.

A record of two or three pages should, in this manner, present a case to the appellate court which, under the present rules, might often require two or three hundred pages, or more. This rule, however, seems to provide that the parties must unite in making such a record. Will all prevailing parties allow their opponents so easy and inexpensive a method of getting into the appellate court? It is to be regretted that the rule does not further provide that the District Court or Judge, in the event of a disagreement between the parties, shall, if the ends of justice require, direct such an appeal, instead of merely approving the same after it has been agreed upon.

DOCKETS.

The Clerk of the District Court is required to keep an "Equity Docket" and an "Equity Journal" in addition to the "Order Book" heretofore required.

ADDITIONAL RULES.

With the concurrence of a majority of the circuit judges for the circuit, the District Courts may make further rules. Rule 79.

Some of the rules have been slightly changed in other particulars, but after careful study and comparison, it is believed that this paper points out every material change effected, or new matter added.

The new rules become effective on the first day of February, 1913.

ROBERT H. TALLEY.

Richmond, Va.
December 7th, 1912.